

STATE OF MICHIGAN

SUPREME COURT

STEPHEN W. WARDA,

Plaintiff-Appellee,

v.

CITY COUNCIL OF THE CITY OF FLUSHING
and CITY OF FLUSHING,

Defendants-Appellants

SUPREME COURT NO. 125561

COURT OF APPEALS NO. 241188

GENESEE COUNTY CIRCUIT COURT
CASE NO. 98-62796-CZ

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DEFENDANTS-APPELLANTS' SUPPLEMENTAL BRIEF
REGARDING JUDICIAL REVIEW OF THE
CITY COUNCIL'S ACTION

FILED

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MICHIGAN SUPREME COURT

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JUDGMENT BEING APPEALED
AND RELIEF SOUGHT

Defendants seek leave to appeal from an unpublished opinion of the Michigan Court of Appeals dated December 23, 2003. The decision of the Court of Appeals affirmed a trial court decision entered November 5, 2001, awarding Plaintiff attorney fees in the amount of \$109,200.00.

Defendants seek to set aside the decision of the Genesee County Circuit Court and the Court of Appeals, affirming it, based upon the Separation of Powers doctrine. Defendants ask this court to set aside the decisions of the lower courts and dismiss this matter peremptorily, based on the court's lack of jurisdiction to review discretionary legislative action by the Flushing City Council. In the alternative, Appellant requests that this Court grant leave to appeal on all issues raised.

STATEMENT OF ISSUES PRESENTED

I. DOES THE SUPREME COURT HAVE AUTHORITY TO RAISE THE ISSUE OF THE COURT'S JURISDICTION WHEN NOT RAISED IN THE TRIAL COURT OR COURT OF APPEALS?

PLAINTIFF WOULD ARGUE "NO."

THE TRIAL COURT DID NOT DECIDE.

THE COURT OF APPEALS DID NOT DECIDE.

DEFENDANTS WOULD ARGUE "YES."

II. IS THE CITY COUNCIL'S DECISION SUBJECT TO JUDICIAL REVIEW WHERE, BY REASON OF THE SEPARATION OF POWER DOCTRINE, A COURT LACKS JURISDICTION TO REVIEW A DISCRETIONARY LEGISLATIVE ACT?

PLAINTIFF WOULD ARGUE "YES."

THE TRIAL COURT CONCLUDED "YES."

THE COURT OF APPEALS CONCLUDED "YES."

DEFENDANTS WOULD ARGUE "NO."

III. SHOULD THE SUPREME COURT SHOULD EXERCISE ITS PREEMPTORY AUTHORITY AND DISMISS THIS CASE FOR LACK OF JURISDICTION?

PLAINTIFF WOULD ARGUE "NO."

THE TRIAL COURT DID NOT DECIDE.

THE COURT OF APPEALS DID NOT DECIDE.

DEFENDANTS WOULD ARGUE "YES."

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STATEMENT OF FACTS

Plaintiff-Appellee in this case is a former police officer with the City of Flushing. (TT Vol. 1, p. 41.) In 1994 Plaintiff was charged in McComb County with the felony of having made a false certification of a salvage vehicle. Plaintiff stood accused of declaring disabled vehicles roadworthy when in fact they were not and of certifying that repairs were made and necessary safety equipment installed when, in fact, it had not. (TT Vol 2, p. 33). Charges were brought arising from two vehicles wherein the owners plead guilty to insurance fraud. Plaintiff-Appellee was acquitted of the charges in 1997. (TT Vol. 1, p. 126). Plaintiff-Appellee thereafter requested reimbursement for his legal expenses in the amount of \$205,000.00. The city council, acting by resolution initially in 1997 and then by way of a clarifying resolution in 1998, denied Plaintiff-Appellee's request for reimbursement. See Exhibits A and B of Appendix.

The City Council's decision was appealed to the Genesee County Circuit Court which determined, contrary to the findings of the City Council, that the inspection was in the course of Plaintiff's employment with the city and further found that the city abused its discretion and found that Plaintiff was entitled to reasonable attorney fees. See Exhibit C.

The matter was appealed to Michigan Court of Appeals by Defendant-Appellant and the decision of the circuit court was affirmed by a 2 to 1 decision. Judge Jansen dissenting. See Exhibit D.

Throughout the course of proceedings, the issue of the court's jurisdiction to review the City Council's action was not specifically raised. The issues that were raised centered on the Council's abuse of discretion and the "emergency doctrine" created by the Michigan Court of

Appeals but absent from the language of the enabling legislation which granted the City Council discretion to pay attorney fees. MCLA 691.1408(2).

Defendant City Council and City of Flushing filed Application for Leave to Appeal to the Michigan Supreme Court. By order of the Michigan Supreme Court, dated October 29, 2004, the parties were directed to file supplemental briefs to include, among the issues briefed, whether the City Council's decision is subject to judicial review. By inference, the court order also suggested that the parties discuss whether the Court should grant the Application or take other peremptory action as permitted by MCR 7.302(G)(1).

ARGUMENT

I. THE SUPREME COURT HAS AUTHORITY TO RAISE THE ISSUE OF THE COURT'S JURISDICTION WHEN NOT RAISED IN THE TRIAL COURT OR COURT OF APPEALS.

That issue arises from the Separation of Powers doctrine. If the court determines that it does not have jurisdiction to review the discretionary actions of a legislative body, it lacks jurisdiction to proceed. Furthermore, it is clear that this matter should go no further and the action of the lower courts should be dismissed.

Courts are bound to take notice of the limits of their authority, and the court may, and should, on its own motion, though the question is not raised by the pleadings or by counsel, recognize its lack of jurisdiction and act accordingly by staying proceedings and dismissing the action, or otherwise disposing hereof at any stage of the proceedings.

Fox v Board of Regents, 375 Mich 238, 242-243; 134 NW 2d 146, (1965). *In re Estate of Fraser*, 288 Mich 392, 394; 285 NW 1 (1939). As in the *Estate of Fraser* case, the trial court here had no jurisdiction, the Michigan Court of Appeals had no jurisdiction and thus this court has no jurisdiction to act. Therefore, it is imperative that this court first determine whether it has jurisdiction and, if not, it should dismiss the action. See *Estate of Fraser, supra*, p. 395; *People v Carlos Jones*, 203 Mich App 74, 78; 512 NW 2d 26 (1993).

II. THE CITY COUNCIL'S DECISION IS NOT SUBJECT TO JUDICIAL REVIEW WHERE, BY REASON OF THE SEPARATION OF POWER DOCTRINE, THE COURT LACKS JURISDICTION TO REVIEW A DISCRETIONARY LEGISLATIVE ACT.

A. Standard of Review

The issues raised in this Supplemental Brief involve the separation of powers doctrine and bears directly upon the court's jurisdiction or ability to review a legislative body's action.

This Court's review may be a violation of the Separation of Powers doctrine. This issue raises a question of law to be decided de novo. *Hopkins v Parole Board*, 237 Mich App 629, 635; 604 NW 2d 686, (1999); *People v Sierb*, 456 Mich 519, 522; 581 NW 2d 219 (1998). In *Wilkins v Gagliardi*, 219 Mich App 260, 266; 556 NW 2d 171 (1996), the court held:

Determining whether constitutional authority has been exceeded or determining what authority has been committed to a particular branch of government is the responsibility of the court. *Baker*, 369 US 211; *House Speaker*, 433 Mich 575.

A conflict between the constitution and the statute is clearly a legal question which only a court can decide." *Univ of Michigan Regents v Employment Relations Comm*, 389 Mich 96, 103; 204 NW2d 218 (1973). In that same vein, the Court in *Baker* stated that deciding

whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. [369 US 211].

See *Dep't of Commerce v Montana*, 503 US 442, 458-459; 112 S Ct 1415; 118 L Ed 2d 87 (1992); *House Speaker*, 443 Mich 575. The political question doctrine is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government. *United States v Munoz-Flores*, 495 US 385, 394; 110 S Ct 1964; 109 L Ed 2d 384 (1990) [emphasis supplied]. Interpretation of the constitution is an exclusive function of the judicial branch. *House Speaker*, 443 Mich 575; *Richardson v Secretary of State*, 381 Mich 304, 309; 160 NW2d 883 (1968).

Finally, the case of *People v Carlos Jones*, 203 Mich App 74, p. 78, (1993) states: "Although the issue is not raised by either party, we must first determine whether we have jurisdiction to hear the prosecutor's appeal. Courts are bound to take notice of the limits of their authority."

B. The Flushing City Council is a legislative body.

The City of Flushing, formerly a village, is a Michigan municipal corporation. It was established as a Home Rule City in 1964, "pursuant to general state law and subject only to the

limitations imposed by the Constitution of the State of Michigan” . . . [with] . . . “all powers of the city . . . vested in an elective council . . .”. City of Flushing Charter, Sec. 1.2. (Exhibit E). The city was established pursuant to Article VII, Sec. 21 of the Michigan Constitution wherein the “Legislature shall provide by general laws for the incorporation of cities and villages. . . .” The city was legislatively created under the Home Rule City Act, MCL 117.1, et seq.

The Flushing City Charter provides that:

All official action of the council shall be by ordinance, resolution or order. Action by resolution or order shall be limited to matters required or permitted to be so done by this Charter or by state or by federal law or pertaining to the internal affairs or concerns of the city government. Section 4.2 of Flushing City Charter. (Exhibit E).

As provided in the constitution of the state of Michigan, Article VII, Section 22, the city

. . . shall have power to adopt resolutions and ordinances relating to municipal concerns, property and government subject to the constitution and law. No enumeration of powers granted to the cities and villages in this Constitution shall limit or reduce the general grant of authority conferred by this section.

Pursuant to MCL 691.1408 the state legislature, confirming the common law, specifically delegated to the city the discretion to pay or furnish legal services for employees charged with criminal offenses. In part, Section 2 provides:

(2) When a criminal action is commenced against an officer or employee of a governmental agency based upon the conduct of the officer or employee in the course of employment, if the employee or officer had a reasonable basis for believing that he or she was acting within the scope of his or her authority at the time of the alleged conduct, the governmental agency may pay for, engage, or furnish the services of an attorney (Emphasis added)

Section 3 provides:

(3) This section shall not impose any liability on a governmental agency. (Emphasis added).

On June 9, 1997 Plaintiff-Appellee requested reimbursement for his legal fees. On September 8, 1997, and as further explained in a resolution of June 8, 1998, the City Council, by

a resolution duly adopted, denied Plaintiff's requested reimbursement for the reasons set forth in the resolutions. These resolutions were passed after Plaintiff and his attorney were given the opportunity to address the city council and the city council was fully apprised of the facts surrounding the reimbursement request.

By passing the resolutions denying Plaintiff his requested reimbursement, the City Council was performing a legislative act. See *Messmore v Kracht*, 172 Mich 120, 122-123, 137 NW 549 (1912); *Randall v Meridian Township Board*, 342 Mich 605, 607 (1955); 70 NW 2d 728 (1955); *Dearborn Township v Township Clerk*, 344 Mich 673, 684-685; 55 NW 2d 201 (1952); *Civil Service Commission v Auditor General*, 302 Mich 673, 682; 5 NW 2d 536 (1942); *Michigan Constitution*, Article VII, Section 22; *MCL* 117.3(a), (l); 117. 4j(3). In *Bendix v City of Troy*, 211 Mich App 801 (1995), vacated by the court on July 11, 1995 at 211 Mich App 801 (1995), however, that opinion was later adopted by a special panel in *Bendix v City of Troy*, 215 Mich App 289, 291 (1996). That special panel dealt with a conflict between the *Bendix* case and *Marposs Corp v City of Troy*, 204 Mich App 156; 514 NW 2d 202 (1994). The *Bendix* decision in 1996 overruled the *Marposs* case in which then Judge Taylor (now Justice Taylor) dissented. Judge Taylor's dissent was reflected in the *Bendix* case at 211 Mich App 801. In citing dissenting Judge Taylor's opinion at page 804-805 the court found that Judge Taylor was correct in holding that the Troy City Council was itself a legislative body and also agreed with Judge Taylor's opinion, found at page 806, that the Troy City Council was itself a legislative body with authority over the discretion as to whether to grant or deny the requested tax exemption and other similar matters of municipal concern. In citing Judge Taylor's dissent the *Bendix* court, 211 Mich App 801, 804-805, stated:

The Troy City Council is 'itself a legislative body' . . . [that] municipal entities are established under our Constitution. *Const. 1963, art VII, §21*. They are

guaranteed a ‘general grant’ of ‘power and authority’ regarding municipal concerns. *Const. 1963, art VII, §22*. The Michigan Legislature has implemented this constitutional grant of authority in the Home Rule City Act, which specifically provides that a city council is a “legislative body” that is “vested with legislative powers. MCL 117.3(a) and (l); MSA 5.2073(a) and (l).

This opinion was adopted by the special panel in *Bendix, supra*, 215 Mich App 289, 291. The judiciary must respect the legislative authority vested in municipal governments. *Schwartz v City of Flint*, 426 Mich 295; 395 NW 2d 678 (1986).

1. The City Council may make decisions concerning municipal matters.

The resolution passed by the Flushing City Council was within its authority as stated in the Constitution, art VII, §22, as provided at common law, see *Messmore, supra*; and by statutory authority. MCL 691.1408 (2). Common law as well as subsequent statutory law made reimbursement of attorney fees solely within the discretion of the city council: . . . “The governmental agency may pay . . .” (Emphasis added). In exercising that discretion, the statute at §3 clearly states that it “shall not impose any liability on a governmental agency.”

The decision made by the Flushing City Council was just such a decision as was contemplated by the clear language of Michigan Constitution, art VII, §22 and MCL 691.1408(2). As with the other decisions involving municipal affairs, the control of the city finances is within the city council. Section 7.2 – 7.4 of the Flushing City Charter allows the City Council to see to it that a budget is prepared, that there is a budget hearing for the public after which the City Council shall, by resolution, adopt the budget for the next fiscal year, including appropriations for the money needed for municipal purposes and providing for a levy for the amount of taxes necessary to be raised. It has been held that “the control of the purse strings of government is a legislative function.” *Civil Service Comm-n v Auditor Gen-l, supra*, page 682.

The Flushing City Council, possessing the powers provided to it by the Michigan Constitution, and as delegated to it through the statutes of the state of Michigan, is a legislative

body. *Dearborn Township v Township Clerk*, 344 Mich 673, 685; 55 NW 2d 201 (1952); *Randall v Meridian Township Board*, 342 Mich 605, 607; 70 NW 2d 728 (1955); *Veldman v City of Grand Rapids*, 275 Mich 100; 265 NW 790 (1936); and as stated by Judge Taylor in *Marposs Corp v City of Troy*, 204 Mich App 156, 165; 514 NW 2d 202 (1994). See also *Schwartz v City of Flint*, 426 Mich 295, 305; 395 NW 2d 678 (1986). Therefore, it is clear that the Flushing City Council has, by the Michigan Constitution, the statutes of the State of Michigan, and by its own Charter, been granted the authority to pass ordinances and resolutions, such as the one involved in this case.

2. The Flushing City Council acted within its constitutional legislative authority.

The Flushing City Council was acting within the scope of the authority granted to it by the Constitution and statutes of the state of Michigan. No argument has been raised that the City did not have discretionary authority to grant or deny Plaintiff's request for reimbursement nor that such action was not within its legislative authority. In fact, Plaintiff, at page 22 and 23 of his Brief in Opposition to Defendant's Application for Leave to Appeal clearly agrees stating: "There has never been any question but that the City enjoys the discretion [as to whether or not to pay attorney fees]", page 22, and that "Whether a municipality has discretion in payment of attorney fees is not an issue in this case." Page 23.

It has been held that, ". . . so long as the city [council] acts within limits prescribed by law, the court may not interfere with its discretion", *Veldman v City of Grand Rapids*, 275 Mich 100, 111; 265 NW 790 (1936). *Veldman* added,

If the city commission had legal authority to do what it did do, that ends the matter. The question of whether the commissioners acted wisely or unwisely is not for the consideration or determination of this court. . . . But so long as they are legally authorized to act, their acts are not subject to judicial control. (Page 112).

Veldman concludes, at page 113, that,

If the charter of the City of Grand Rapids is constitutional and of this there seems to be no question, and the State has thus conferred upon the city commission the power which it exercised and left the exercise of it to the judgment and discretion of the commissioners, then their action is conclusive.

Citing *Attorney General, ex rel Dissell v Burrell*, 31 Mich 25; *Upjohn v Richland Township Board of Health*, 46 Mich 542.

C. The judiciary will not interfere with the discretionary actions of legislative bodies.

1. Separate but Equal

It is noted by our Supreme Court in *Detroit v Circuit Judge of Wayne County*, 79 Mich 384, 387; 44 NW 622 (1980); that,

It is one of the necessary and fundamental rules of law that the judicial power cannot interfere with the legitimate discretion of any other department of government. So long as they do no illegal act, and are doing business in the range of the powers committed to their exercise, no outside authority can intermeddle with them; and, unless the action complained of in the court below was beyond the legal discretion of the city, the circuit court had no jurisdiction to grant injunction which was allowed.

In that case, where the city was requesting bids for a proposal to light the city and where the circuit court granted an injunction, the Supreme Court found that, “. . . the injunction was an invasion of the discretionary power vested in the city in managing its own affairs, and was beyond the power of the circuit court.” Page 389.

Article III, §2 of the Michigan Constitution provides for the division of powers in three branches of government: legislative, executive and judicial. One branch may not exercise powers belonging to the other; see *Wolgamood v Constantine*, 302 Mich 384, 395; 4 NW 2d 697 (1942); *Putnam v City of Grand Rapids*, 58 Mich 416, 419; 25 NW 330 (1885), which found that generally, where a municipality has the power to engage in an activity for a public purpose, the

courts will not interfere with the discretionary acts of its municipal officials. The *Putnam* court, *supra*, continuing at page 419, stated:

There has been an idea in some places, as apparent from reported cases, that courts of equity can always stand between citizens and municipal authorities, to shield them from abusive and extravagant action. This is not one of the functions of court. It is one of the incidents of popular government that the people must bear the consequences of the mistakes of their representatives. No court can save them from this experience. It is one of the means of teaching the necessity of choosing proper servants, and being vigilant to obtain reform from abuses. The discretion which is necessarily vested in public functionaries cannot be reviewed by anyone else. If they go beyond the range of the discretion given them, and mischief happens or is likely to happen, a case arises for the interference of judicial authority to keep them within the lines bounding their agency. But their mistakes within those lines are beyond legal redress..

In *Putnam* the action of the city was set aside because it violated the city charter. In *Wolgamood* the case involved a claim that the village officer should be held in contempt for failing to follow a court order. The lower court and the Michigan Supreme Court held that they were not guilty of contempt where their actions did not go beyond the authority granted to them by law.

2. Authorized Discretionary Actions

The *Messmore* court, *supra*, at pages 122 to 123, cited with approval the case of *Sherman v Carr*, 8 RI 431, which stated in part:

It would seem, therefore, to be the wisest to leave the indemnification of the officer to the discretion of those who represent the interest of the city, that, on the one hand they should not be without the power to indemnify a meritorious officer, acting in good faith, for the consequences of his conduct, and on the other hand, they should not be obliged to protect every officer, though acting in good faith, under circumstances which seem to them to indicate a blamable want of care and caution. . . This distribution of power, which would be practically the wisest in the administration of municipal affairs, is the one which we understand to be in accordance with existing law and long continued practices in this state. . . . We know of no case in which, while the officer continues to act in behalf of the community, it cannot indemnify him. We therefore find that the appropriation of money in this case by the city council of New Port was within their authorized powers, and it is not for us to inquire as to the wisdom or discretion with which those powers are exercised.

3. Defferential Approach

In *Bendix v City of Troy*, 215 Mich App 289, 296; 544 NW 2d 481 (1996), Judge O'Connell, joined by Judge Markley, in a concurring opinion [two of the seven member special panel of the Michigan Court of Appeals], stated:

Less than two decades ago, the Michigan Judiciary experimented with treating the actions of municipal legislative bodies as something other than legislative action. Creating a fiction that in some respects local legislative bodies, because they make an effort to find facts and apply legal standards, seem to be acting like quasi judicial administrator bodies, the judiciary extended its reach and began reviewing such action without consideration of separation of powers principles. This brief experiment was a total failure, and the court soon reverted to a properly defferential approach to these legislative decisions arrogating the power of review only with respect to claims that such a legislative action violated some clear and established constitutional norm. (Citations omitted).

In the *Bendix* case there is no claim that the City of Troy violated some clear and established constitutional norm. Justice O'Connell further indicated at page 298, that

. . . a legislative body need not provide reasons for its actions.

[He further added]

. . . if the reasons underlying its decision are invalid but other conceivable reasons might have been adduced in support of such action that would be valid, the courts are obliged to presume the latter motivation and uphold the legislative choice.

[At page 299 he stated],

Judicial misgivings regarding the wisdom of legislative policy do not provide a legal foundation for overriding legislative decisions.

[Lastly he states at page 300],

Whether the Troy City Council was motivated by good reasons or bad, by compelling logic or sophistry, by considerations of public good, or by parochial or even private considerations, is no concern of the judiciary, for the state legislature must have anticipated such outcomes when it designed the abatement process in this fashion.

If the result is unpalatable or nonunitarian, the remedy lies in a return to the Legislature for presentation of these arguments. This Court, lacking power to consider such questions, would be imprudent to entertain them substantively and imprudent to express any opinion upon them. Pursuant to Const in 1963, art. III, §2, the judiciary has no legislative powers, and, thus, it cannot act as a “super legislature” to sit in review of the policy choices made by coordinate branches of government acting within their spheres of responsibility.”

D. The Political Question Doctrine

“The Political Question Doctrine ‘is designed to restrain the judiciary from inappropriate interference with the business of the other branches of government.’ *Wilkins v Gagliardi*, 219 Mich App 260, p. 266 (1996) citing *The United States v Munoz-Flores*, 495 US 385, 394; 110 S Ct 1964; 109 L Ed2 384 (1990).

In *Bendix v City of Troy*, *supra*, p. 294, Judge O’Connell in his concurring opinion, states that as a

corollary to the separation of powers principle is the political question doctrine, which requires analysis of three inquiries: [1] Does the issue involve resolution of questions committed by the text of the constitution to the legislature or executive branches of government? [2] Would resolution of the question demand that the court move beyond areas of judicial expertise? [3] Do considerations for maintaining community between a coordinate branches of government counsel against judicial intervention? Citing *House Speaker v Governor*, 443 Mich 560, 574; 506 NW 2d 190 (1993).

The *Bendix* case involved questions of tax policy which the court first found were issues committed by the text of the Michigan Constitution to the legislature. Second, the court found that the judiciary certainly possessed no special expertise in matters of tax policy, and finally, the court found that prudent considerations mitigate more strongly against judicial intervention. Judge O’Connell continued that, “it was only when there is a claim that the legislative action violated some clear and established constitutional norm would it intervene.” See pages 294 – 296. As in *Bendix*, *supra*, the resolution by the City Council of Flushing is a legislative action; review of such action would require that the court move beyond areas of its judicial expertise,

i.e. being adjudicative, and finally for the court to intervene would grant judicial oversight of legislative action inviting disrespect for the political and thus nonjusticiable, choices made by the local legislative body. The *Bendix* court thus found their roll of review would be only with respect to claims that such legislative action violated some clear and established constitutional norm. Page 296.

III. THE SUPREME COURT SHOULD EXERCISE ITS PREEMPTORY AUTHORITY AND DISMISS THIS CASE FOR LACK OF JURISDICTION.

A. The Court lacks jurisdiction to review the City Council's constitutionally and legislatively authorized Resolution.

Since it is agreed by both Appellee and Appellant that the City Council's action was within its constitutional and legal authority [there having been no claim that the City's actions violated the Constitution or the statutes of the State of Michigan] the City Council's actions are not subject to judicial review. Therefore, the courts have no jurisdiction to review the City Council's action.

The acts of the court to intervene or to substitute its own judgment for that of the City Council would violate the doctrine of Separation of Powers, and the court would be acting without jurisdiction. Any court acting without jurisdiction in a particular case would do so without having any force or validity and its actions would thus be void. Finally, a court which determines that it has no jurisdiction should not proceed further except to dismiss the action. See *Fox v Board of Regents*, 375 Mich 229, 242-243; 134 NW 2d 146 (1965). The *Fox* case also cites *In re The Estate of Fraser*, *supra*, for the proposition that,

Courts are bound to take notice of the limits of their authority, and a court may, and should, on its own motion, though the question is not raised by the pleadings or by counsel, recognize its lack of jurisdiction and act accordingly by staying proceedings, dismissing the action, or otherwise disposing thereof, at any stage of

the proceedings. See *Ecorse v Peoples C. Hosp. Authority*, 336 Mich 490; 58 NW 2d 159 (1953).

Justice Levin in *People v Caballero*; 437 Mich 885, 886-887; 463 NW 2d 891 (1990), argues that, the court was, . . . “obliged to recognize the absence of jurisdiction although it appears that the issue was not raised in the Court of Appeals;”. He also cited various cases dealing with the issue of jurisdiction or the lack thereof, and stated:

Courts are bound to take notice of the limits of their authority and the court may, and should, on its own motion, though the question is not raised by the pleadings or by counsel, recognize its lack of jurisdiction and act accordingly by staying proceedings, dismissing the action or otherwise disposing thereof, at any stage of the proceedings. [*In re Fraser Estate*, 288 Mich 392, 394 (1939)].

An order entered by a court without jurisdiction ‘is absolutely void’; *In re Hague*, 412 Mich 532, 544 (1982);

If there is a true jurisdictional defect, the court has acted without authority, its judgment is a nullity and is always subject to collateral attack. *Edwards v Meinberg*, 334 Mich 355, 359 (1952).

In *Liberty Mutual Ins Co v Wetzel*, 424 US 737, 740 (1976) the United States Supreme Court said:

Though neither party has questioned the jurisdiction of the Court of Appeals to entertain the appeal, we are obliged to do so on our motion if a question were to exist. Because we conclude that the District Court’s order was not appealable to the Court of Appeals, we vacate the judgment of the Court of Appeals with instructions to dismiss the petitioner’s appeal from the order of the District Court. (Citation omitted).

The court has also said that in such a case, a supreme court has jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit. *United States v Corrick*, 298 US 435, 440 (1936).

Thus, where it is clear that a court lacks jurisdiction to substitute its opinion for that of the city’s legislative body acting within its constitutional and legislative authority, any action on the part of the court, other than to dismiss the action, is beyond its authority to act and in violation of the constitutional separation of powers doctrine. Here the actions of the city were

within its constitutional legislative authority and thus the courts cannot sit as super legislature or sit and review the policy choices made by the City Council, a coordinate branch of government, acting within its sphere of responsibility. *Bendix v City of Troy*, 215 Mich App 289, 300, 544 NW 2d 481 (1996).

If constitutional integrity is to be maintained, the Flushing City Council must be allowed to exercise its constitutional authority to legislate free of the interference of the judiciary. The resolution passed by the City Council denying Plaintiff reimbursement for attorney fees represented the legitimate expression of the City. That resolution must stand. Thus, the City's discretionary determination is insulated from any judicial involvement or oversight. See *Hopkins v Parole Board*, 237 Mich App 629, 639; 604 NW 2d 686 (1999). See *Wayne Prosecutor v Wayne County Commissioners*, 93 Mich App 114, 121-122; 286 NW 2d 62 (1979).

B. THE SUPREME COURT SHOULD EXERCISE ITS PEREMPTORY AUTHORITY AND DISMISS THIS CASE.

This Court should take peremptory action to dismiss this matter or in the alternative grant Appellant's Application for Leave to Appeal on all issues.

As provided in MCR 7.302(G)(1), "The court may grant or deny the application, enter a final decision or issue a peremptory order." Appellants suggest that the peremptory order of dismissal in this case is most appropriate because of the court's lack of jurisdiction. As indicated in *Fox v Board of Regents, supra*, *In re Estate of Fraser, supra*, this matter should simply be dismissed. This approach is suggested very strongly in the case of *People v Caballero, supra*. As stated in *Veldman v City of Grand Rapids, supra*, "If the city commission had legal authority to do what it did do, that ends the matter." The Veldman court found that the City of Grand Rapids, . . . "acted and we cannot find on the record before us it violated the constitution, statutes

or charter of the city in so doing.” The court should proceed no further except to dismiss. *Fox v Board of Regents, supra*, page 242. See *Bartkowiak v Wayne County*, 341 Mich 333, 343; 67 NW 2d 96 (1954).

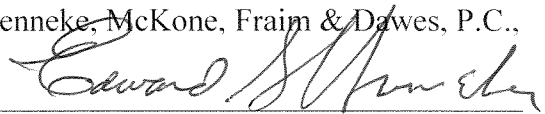
CONCLUSION AND
RELIEF REQUESTED

The City of Flushing City Council’s discretionary decision was within its authority granted not only by the State Constitution but by the Statutes of the State of Michigan. This was a legislative act which is not subject to judicial review. This conclusion necessarily follows as a result of the Separation of Powers doctrine. As this court lacks jurisdiction to address this issue, this matter should be dismissed and remanded to the Circuit Court for dismissal. This court should take peremptory action to dismiss the matter thus reinstating the decision of the Flushing City Council, pursuant to MCR 7.302(G)(1). Should this court desire to hear further argument on this matter, Defendant-Appellant would request that oral argument be granted on whether to grant the application on all issues raised or take other peremptory action permitted.

Dated: November 23, 2004

Respectfully submitted,

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